

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
HUNTINGTON DIVISION**

**CHRISTOPHER FAIN; ZACHARY  
MARTELL; and BRIAN MCNEMAR,**  
Individually and on behalf of all others  
similarly situated,

**Plaintiffs,**

**Civil Action No. 3:20-cv-00740  
Hon. Robert C. Chambers, Judge**

**v.**

**WILLIAM CROUCH**, in his official capacity as  
Cabinet Secretary of the West Virginia  
Department Of Health and Human Resources;  
**CYNTHIA BEANE**, in her official capacity as  
Commissioner for the West Virginia Bureau for  
Medical Services; **WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN  
RESOURCES, BUREAU FOR MEDICAL  
SERVICES; TED CHEATHAM**, in his official  
Capacity as Director of the West Virginia Public  
Employees Insurance Agency; and **THE  
HEALTH PLAN OF WEST VIRGINIA, INC.**

**Defendants.**

**WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES’  
RESPONSE TO PLAINTIFFS’ MOTION FOR ENTRY OF A PARTIAL ESI  
PROTOCOL, PROTECTIVE ORDER, DEPOSITION PROTOCOL ORDER, 502(D)  
CLAWBACK ORDER, AND ORDER REGARDING VIRTUAL DEPOSITIONS**

Now come the Defendants, William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, Bureau for Medical Services, by counsel, and submit their response to Plaintiffs’ Motion for Entry of a Partial ESI Protocol, Protective Order, Deposition Protocol Order, 502(D) Clawback Order, and Order Regarding Virtual Depositions, as well as to provide these Defendants’ position on the production of ESI as it relates to the discovery plan in

this matter. This case involves the question of whether the Defendants have certain policies regarding medical coverage and whether or not those policies violate the Plaintiffs' constitutional rights or other federal statutes. Metadata and ESI do not appear likely to play a crucial role in discovery, and focusing on lengthy, detailed formats and protocols for the production of ESI serves only to add unnecessary cost and delay for no anticipated benefit. As such, these Defendants take the position that protocols for the format and production of ESI are not necessary in this matter and object to the adoption of same. Therefore, these Defendants request that Plaintiffs' Motion be denied in part as it relates to request for entry of a Partial ESI Protocol (ECF Doc. No. 77-3), including the proposed Format for Production as well as any further, additional ESI Protocol.

The Plaintiffs first proposed a "Format for the Production of Documents Including Electronically Stored Information" on June 21, 2021, in connection with the Rule 26(f) conference. A follow-up conference was held on July 6, 2021, at which time it was discussed that, without knowing the nature of the documents that the Plaintiffs would be requesting in discovery, the Defendants could not adequately assess the issues surrounding document production and, specifically, the role that ESI may reasonably be expected to play in discovery. Thereafter, the Plaintiffs served requests for production of documents and things on the Defendants. After reviewing the requests, and upon further reflection regarding the nature of the claims and the anticipated evidence, it does not appear that ESI is likely to be critical to the material issues in the case or in connection with the document requests. As such, these Defendants take the position that neither a Format for Production, nor a Stipulated ESI Protocol as proposed by the Plaintiffs are necessary in this matter. To the contrary, such protocols are anticipated to place an unnecessary burden of time and expense on the parties in producing documents that is not justified in the circumstances given the nature of the case and nature of the issues.

It is anticipated that the Federal Rules of Evidence are adequate to allow the parties to work through, on an individual basis, any particular request for document production that may implicate the need for metadata or ESI to be produced. The Federal Rules of Civil Procedure provide mechanisms to address such discovery issues as they arise, without the need to resort to a separate procedure or protocol.

With respect to additional items outlined in the Report of Parties' Planning Meeting (ECF Doc. No. 73), these Defendants further state that they are in agreement with the following documents:

1. Proposed Protective Order (ECF No. 77-4);
2. Proposed Stipulation for Virtual Depositions (ECF No. 77-7);
3. Proposed Agreed Order Governing the Inadvertent Disclosure of Documents or Other Material Under Rule 502(d) (ECF No. 77-6); and
4. Proposed Order Setting Deposition Protocol Order (77-5).

Wherefore, these Defendants request that the Plaintiffs' Motion be denied in part, that the Court decline to adopt the "Format for the Production of Documents Including Electronically Stored Information" (ECF Doc. No. 77-3), and decline to order any further submission of proposed ESI protocols in this matter.

**WILLIAM CROUCH, CYNTHIA BEANE, and  
WEST VIRGINIA DEPARTMENT OF HEALTH AND  
HUMAN RESOURCES, BUREAU FOR MEDICAL  
SERVICES,**

**By Counsel**

/s/ Kimberly M. Bandy

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Capacity as Director of the West Virginia Public  
Employees Insurance Agency; and **THE  
HEALTH PLAN OF WEST VIRGINIA, INC.**

**Defendants.**

**CERTIFICATE OF SERVICE**

Now come defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, Bureau for Medical Services, by counsel, and hereby certify that on the 20<sup>th</sup> day of August, 2021, the foregoing **“WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES’ RESPONSE TO PLAINTIFFS’ MOTION FOR ENTRY OF A PARTIAL ESI PROTOCOL, PROTECTIVE ORDER, DEPOSITION PROTOCOL ORDER, 502(D) CLAWBACK ORDER, AND ORDER REGARDING VIRTUAL DEPOSITIONS”** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to, and constitutes service on:

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